

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHARLES ROBINS,
a/k/a Ha'im Al Matin Sharif,

Petitioner,

vs.

RENEE BAKER, *et al.*,

Respondents.

2:99-cv-0412-LRH-PAL

ORDER

Introduction

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Charles Robins, a Nevada prisoner sentenced to death. Robins' convictions and death sentence result from the death of eleven-month-old Brittany Smith in Las Vegas in the early morning of April 19, 1988. Robins was convicted of child abuse and murder, and was sentenced to a 20-year prison sentence for the child abuse and to death for the murder.

The case is now before this court with regard to a motion by Robins for leave to file a fourth amended habeas petition (ECF No. 262) and a motion for stay and abeyance (ECF No. 268). The court will grant both motions, allowing the amendment of Robins' habeas petition, and staying the case pending Robins' exhaustion of claims in state court.

1 Background Facts and Procedural History

2 The Nevada Supreme Court, in its 1990 decision affirming Robins' conviction and sentence,
3 described the facts of the case, in light of the evidence at trial, as follows:

4 The evidence adduced at trial demonstrated a pattern of abusive treatment of
5 eleven-month-old Brittany Smith (Brittany) by Robins, who was living with the child
6 and her mother, Lovell McDowell. This abusive treatment by Robins ultimately
7 resulted in the infant's untimely and brutally violent death.

8 Several witnesses testified concerning Robins' abusive treatment of Brittany.
9 Evidence indicated that Robins regularly punched and kicked Brittany. He often held
10 his hand over her mouth and nose until she gasped for breath. On several occasions
11 Robins held Brittany underwater in the bathtub until she came up gasping for breath.
12 One witness observed an occasion when Robins caused the infant to turn blue from
13 lack of breath. Robins frequently shut Brittany in a dark bathroom for several hours
14 at a time. Once he was seen holding the infant over a second floor railing by her neck
15 and shaking her. Other incidents of abuse by Robins included putting Brittany on the
16 top shelf of a closet (some six feet above the floor), closing the door, and letting her
17 fall to the floor. Robins would also force his finger down Brittany's throat and cause
18 her to gag. One witness testified that Robins frequently repeated this abuse until the
19 child could no longer gag and ceased crying.

20 At one point Brittany suffered a broken leg, for which medical treatment was
21 delayed. The child's fracture was evidenced by a painful knot on her leg. Initially,
22 neither Robins nor the mother sought treatment for the infant; however, after the knot
23 reappeared and became quite painful, Brittany was taken to the hospital. Radiographs
24 revealed that Brittany's right femur was fractured and that callus had formed, which
25 meant the fracture was from ten to fourteen days old. Moreover, an examination of
26 the radiographs also showed the presence of a previous partially healed fracture that
occurred ten to twenty days earlier. Brittany's condition required her placement in a
body cast. A witness recounted seeing Robins swing Brittany by the cross-bar of her
cast (the body cast extended from Brittany's waist down her legs, with a cross-bar
between the legs).

Over a period of time, several reports were received by the Las Vegas
Metropolitan Police Department's (LVMPD) child abuse unit concerning Brittany.
However, follow-up investigations failed to uncover the extent of the abuse in the
home and no remedial action was ever taken. Brittany's mother, Lovell McDowell,
was interviewed concerning the child's broken leg. McDowell falsely explained at
the time that the injury was caused by babysitters, whose whereabouts in California
were unknown.

The events leading to Brittany's death occurred in the early morning hours of
April 19, 1988. The details of that morning were supplied by several witnesses.
McDowell testified that on the night Brittany died, the child was sleeping and she and
Robins finished eating around 12:30 a.m. Thereafter, she fell asleep but was soon
awakened by sounds of gagging or choking. She hollered to Robins, "What's wrong
with Brittany?" He responded, "nothing wrong." The mother arose and encountered
Robins, who was holding Brittany, in the hallway. She then returned to the room to
get Brittany a towel when she heard Robins hollering, "Brittany, come on. Brittany,

1 wake up. Wake up Brittany.” McDowell immediately dialed 911 and thereafter ran
2 into the parking lot of their apartment complex, screaming that her baby had stopped
3 breathing. An Air Force Sergeant heard the screams and sought to help the child by
performing CPR. The security guard called the LVMPD and paramedics were also
immediately summoned.

4 The paramedics rushed Brittany to the hospital where measures were taken to
5 restore breathing and a heartbeat. The infant could not be revived, however, and was
pronounced dead shortly after her arrival.

6 A LVMPD officer responding to a call met Robins outside the apartment at
approximately 2:30 a.m. Robins was given a Miranda warning, following which he
7 gave the officer a brief statement recounting the events of the evening. Later a
homicide detective with the LVMPD was dispatched to Robins’ apartment in
8 reference to an infant’s death. A taped statement was taken from Robins and
following an investigation, Robins was arrested for Brittany’s murder.

9 A medical examiner’s autopsy investigation revealed a number of injuries,
10 some of which were substantially more recent than others. The external exam
revealed bruises under Brittany’s jaw, bruises on the upper portion of her sternum and
11 a number of bruises on her back. Additionally, there was a small hemorrhage in the
left flank. The internal examination uncovered a number of injuries. First, there were
12 multiple hemorrhages in the scalp on the left side and top of the head and there were
bilateral subdural hemorrhages. The brain was swollen (a direct response to injury).
13 Further internal examination of the abdominal and thoracic cavities revealed
additional injuries. There were a number of hemorrhages in the mesentery
14 (supporting connective tissue) of the intestines. Additionally, there was substantial
internal scarring on the left side below the kidney. The scar tissue encased the ureter,
15 and extended from the kidney down to the large intestine.

16 Dr. Hollander’s microscopic examination of the scar tissue revealed numerous
injuries. There were fresh hemorrhages, granulation tissue (the body’s first reaction
17 to injury in the healing process), and fibrous (scar) tissue which takes approximately
six weeks from the initial injury to form. The medical examiner noted that Brittany’s
18 right femur showed signs of having been broken in the past. She had to reference
Brittany’s medical records to ascertain that the leg had been broken twice and was in
19 the process of healing.

20 Finally, the autopsy revealed that Brittany had suffered a transverse separation
of her eleventh thoracic vertebra (a broken back). It was the examiner’s opinion that
21 this injury was the result of substantial blunt force trauma that was administered less
than twenty-four hours prior to Brittany’s death.

22 In conclusion, the medical examiner opined that CPR, even if improperly
23 performed, could not have caused Brittany’s injuries. She was of the opinion that
Brittany was a battered child and that death was by homicide.

24 Robins testified on his own behalf. He admitted doing many of the things
25 testified to by the State’s witnesses. However, he characterized his actions as rough
play, to make Brittany tough. Incredibly, Robins stated that he had no intention of
26 hurting Brittany.

1 Robins specifically denied ever picking Brittany up by the cross-bar of her
2 body cast. He also denied putting his finger down Brittany's throat to gag her. He
3 did admit to putting his fingers in Brittany's mouth in an effort to prevent her from
spitting. Robins testified that he never hit Brittany in the face with his fists with or
without jewelry on his hands and denied the existence of the bathtub incidents.

4 Robins admitted placing Brittany in the bathroom when she cried and
5 company was present. His stated reason for doing so was to persuade her to stop
6 crying. Robins also denied that he had ever picked the child up by her neck as
charged by a State's witness. He said that he had picked her up by the arms. Again,
he denied any intention of hurting the baby in any of these actions.

7 Robins also placed a benign connotation on Brittany's experience on the
8 closet shelf. He stated that in an effort to teach Brittany not to crawl off the bed, he
9 put her on the bottom shelf of the closet and allowed her to fall off that shelf. The
shelf, according to Robins, was three and one-half inches above the floor. He denied
ever placing Brittany on a closet shelf six feet above the floor.

10 Concerning the events on the night Brittany died, Robins testified in detail. He
11 stated that he and McDowell had been engaged in a "romantic encounter," after which
12 they fell asleep. Robins said he woke up and that following a telephone call, he and
13 McDowell ordered pizza. Robins also stated that McDowell did not go to sleep after
eating pizza, as she had testified. Robins said he told McDowell he was going to
wake Brittany in order to check on her because she had been congested with a cold
and had occasionally vomited.

14 After Brittany was awake, Robins said he played with her for a few minutes.
15 McDowell called out, telling Robins not to be too long with Brittany. Eventually,
16 Robins kissed Brittany and got up to leave when he heard Brittany cough twice and
17 saw her start to spit up. He said Brittany was breathing rapidly and that he froze,
18 waiting for her to snap out of it. According to Robins, Brittany just stopped
breathing. Robins testified that at that point he panicked. He said he yelled,
"Brittany, wake up. Brittany, wake up." In an effort to awaken her, Robins threw
water in her face but she was still unresponsive. At that point he laid her back down
and tried to apply CPR.

19 Robins spoke freely with the police and stated that he told them to the best of
20 his knowledge what had occurred. Robins said he loved Brittany like a daughter, and
21 while admitting to rough play, he denied any intention to hurt or kill Brittany. He
admitted to being the last person to see Brittany conscious.

22 Five days following the return of guilty verdicts by the jury, the penalty
23 hearing commenced. The State called several witnesses who described Robins as an
24 extremely violent man. In particular, Robins had severely beaten a young man who
25 was involved in Robins' drug sales. Robins had made numerous statements to friends
26 and associates that he would kill a police officer. Finally, there was evidence that
Robins had threatened to bomb the apartment where McDowell, Brittany and another
of McDowell's boyfriends were living. His stated purpose was to kill everyone in the
apartment. The police were called and the situation was peacefully resolved.

1 McDowell concluded her testimony during the penalty phase by relating, over
2 defense counsel's objection, that her brother and uncle had received threatening notes
while she was in jail. Robins was also in jail when the notes were delivered.

3 Additionally, there was evidence indicating Robins was substantially involved
4 in the sale of rock cocaine. Evidence of one of Robins' arrests for the sale of cocaine
was introduced. Robins objected to this testimony because charges were never filed.
5 There was also some testimony tending to connect Robins with gangs.

6 In his defense, Robins called several witnesses. Generally, the tenor of the
testimony concerned not seeing Robins abuse either Brittany or other children he had
7 been around, his general nature and non-violent personality.

8 *Robins v. State*, 106 Nev. 611, 614-18, 798 P.2d 558, 560-63 (1990), *cert. denied*, 499 U.S. 970
9 (1991).

10 Robins was convicted of first degree murder and was sentenced to death on the murder
11 conviction. *See* Exhibit 43 (ECF No. 146-4).^{1 2} He was also convicted of felony child abuse with
12 substantial bodily harm, and was sentenced to twenty years in prison on that conviction. *See*
13 Exhibit 47 (ECF No. 146-8).

14 Robins appealed to the Nevada Supreme Court, and that court affirmed his convictions and
15 sentences on September 19, 1990. *Robins*, 106 Nev. 611, 798 P.2d 558. Robins' petition for
16 rehearing was denied on December 18, 1990. Exhibits 66 (ECF No. 147) and 67 (ECF No.
17 147-1). The Supreme Court of the United States denied Robins' petition for a writ of certiorari on
18 April 15, 1991. Exhibit 71 (ECF No. 147-5).

19 On July 5, 1991, Robins filed, in the state district court, a petition for post conviction
20 relief. Exhibit 80 (ECF No. 147-14). He filed a supplemental petition in that action on
21 September 16, 1991. Exhibit 87 (ECF No. 147-21). The state district court denied relief. Findings

22
23 ¹ Unless otherwise noted, in this order, the exhibits referred to by number, in the form
24 "Exhibit __," are those exhibits filed by the respondents in support of their motion to dismiss
on January 8, 2010 (ECF No. 144-152) (Exhibits 1-235) or those filed by Robins in support of his motion
to amend and motion for stay on June 11, 2013 (ECF No. 263-266) (Exhibits 236-275).

25 ² Because of a glitch in an early version of ECF, the attachment numbers relative to ECF filings
26 are not always consistent within ECF. In this order, in identifying the location of exhibits, the court
refers to the attachment numbers appearing on the docket for the case (which, in some cases, is different
from the attachment numbers appearing in the headers on the exhibits themselves).

1 of Fact, Conclusions of Law and Order, Exhibit 97 (ECF. No. 148-1). Robins appealed. *See*
2 Appellant's Opening Brief, Exhibit 107 (ECF No. 148-11). On May 27, 1993, the Nevada Supreme
3 Court affirmed the denial of relief on all Robins' claims but one, and, on that claim, a claim of
4 ineffective assistance of counsel for failure of counsel to investigate and present mitigating evidence
5 in the penalty phase of the trial, the court remanded the case to the state district court for an
6 evidentiary hearing. Order of Remand, Exhibit 112 (ECF No. 148-16). The evidentiary hearing
7 was held on January 31, February 20, March 6, March 13, and March 20, 1997. *See* Exhibit 140
8 (ECF Nos. 149-14 and 149-15), Exhibit 141 (ECF Nos. 149-16 and 149-17), Exhibit 145 (ECF Nos.
9 149-21, 149-22, 149-23, and 149-24), Exhibit 150 (ECF No. 149-29), and Exhibit 152 (ECF No.
10 150-1). Following the evidentiary hearing, on June 10, 1997, the district court denied relief. *See*
11 Findings of Fact and Conclusions of Law, Exhibit 153 (ECF No. 150-2).

12 While the evidentiary hearing was ongoing, on March 6, 1997, Robins filed, in the Nevada
13 Supreme Court, a petition for writ of mandamus, or, in the alternative, writ of prohibition, seeking an
14 order that the state district court allow the testimony of an expert on child abuse and "shaken baby
15 syndrome," and introduction into evidence of exhibits related to that testimony. *See* Petition for Writ
16 of Mandamus or, in the Alternative, Writ of Prohibition, Exhibit 147 (ECF No. 149-26). That
17 petition was denied. Order Denying petition for Writ of Mandamus or Prohibition, Exhibit 148
18 (ECF No. 149-27).

19 Robins appealed from the denial of the remanded claim. *See* Appellant's Opening Brief,
20 Exhibit 168 (ECF No. 150-24). On November 24, 1998, the Nevada Supreme Court dismissed
21 Robins' appeal, ruling that Robins' trial attorneys performed deficiently in not further researching his
22 background and in not presenting evidence regarding it at the penalty phase of his trial, but that
23 Robins was not prejudiced. Order Dismissing Appeal, Exhibit 171 (ECF No. 150-27). Robins'
24 petition for rehearing, Exhibit 175 (ECF No. 151-1), was denied on March 17, 1999. Exhibit 177
25 (ECF No. 151-3).

1 This court received Robins' *pro se* habeas corpus petition (ECF No. 5), initiating this action,
2 on April 6, 1999. The petition was filed on May 5, 1999, after Robins was granted *in forma*
3 *pauperis* status (ECF Nos. 4, 5). Robins subsequently filed supplements to the petition (ECF Nos.
4 7, 9). Counsel was appointed for Robins (ECF Nos. 4, 6, 8, 10, 12, 18, 19). Robins then conducted
5 discovery (*see* ECF No. 22, 46, 56, 62, 75, 76, 87, 91).

6 On August 30, 2004, respondents filed a motion to dismiss (ECF No. 98), arguing that
7 Robins' amended habeas petition contained claims not exhausted in state court. Robins responded to
8 the motion to dismiss with a motion for stay (ECF No. 101), requesting that this action be stayed to
9 allow him an opportunity to return to state court to exhaust claims. On January 21, 2005, the court
10 denied the motion to dismiss and granted the motion for stay (ECF No. 104). Then, on
11 March 14, 2005, after Robins filed a second amended habeas petition (ECF No. 105) containing
12 what were purported to be only exhausted claims, the court stayed the action pending Robins' further
13 exhaustion of claims in state court (ECF No. 106).

14 On May 11, 2005, Robins filed his second state-court petition for a writ of habeas corpus.
15 Exhibit 180 (ECF No. 151-6, 151-7, 151-8). The state district court dismissed that petition on
16 procedural grounds. *See* Findings of Fact, Conclusions of Law and Order, Exhibit 199 (ECF No.
17 151-28). Robins appealed, and the Nevada Supreme Court affirmed. *See* Order of Affirmance,
18 Exhibit 228 (ECF No. 152-29). Robins' petition for rehearing was denied on May 19, 2009. *See*
19 Order Denying Rehearing, Exhibit 234 (ECF No. 152-35).

20 On June 23, 2009, the stay of this federal habeas corpus action was lifted. Order entered June
21 23, 2009 (ECF No. 126). On September 22, 2009, Robins filed a third amended habeas corpus
22 petition (ECF No. 133).

23 On January 8, 2010, respondents filed a motion to dismiss the third amended petition
24 (ECF No. 143). On August 11, 2010, the court granted that motion in part and denied it in part (ECF
25 No. 180). The court dismissed Grounds 9 through 24 of Robins' third amended petition on
26

1 grounds of the statute of limitations and the procedural default doctrine, leaving Grounds 1 through 8
2 of the third amended petition to be decided on their merits.

3 On January 28, 2011, respondents filed an answer (ECF No. 187), responding to Grounds
4 1 through 8 of the third amended petition.

5 On September 29, 2011, after she unreasonably delayed filing Robins' reply, the court
6 discharged Robins' counsel, Patricia Erickson, and appointed new counsel, the Federal Public
7 Defender for the District of Nevada. Order entered September 29, 2011 (ECF No. 204); Order
8 entered October 5, 2011 (ECF No. 205). On July 18, 2012, the court granted a motion to withdraw
9 filed by the Nevada Federal Public Defender, and appointed the Federal Public Defender for the
10 District of Arizona to represent Robins. Order entered July 18, 2012 (ECF No. 221).

11 On June 11, 2013, now represented by the Arizona Federal Public Defender, Robins filed his
12 "Motion for Leave to File Fourth Amended Petition for Writ of Habeas Corpus" (ECF No. 262)
13 ("motion to amend"), with his proposed fourth amended petition (ECF No. 262-1) attached as
14 Exhibit A. On June 11, 2013, Robins also filed his "Motion for Stay and Abeyance" (ECF No. 268)
15 ("motion for stay"). On August 26, 2013, respondents filed an opposition to the motion to amend
16 (ECF No. 277), and an opposition to the motion for stay (ECF No. 275). On September 26, 2013,
17 Robins filed a reply in support of his motion to amend (ECF No. 283)³, and a reply in support of his
18 motion for stay (ECF No. 285).

19 Motion to Amend

20 Under Federal Rule of Civil Procedure 15(a), a party may file an amended petition more than
21 21 days after a responsive pleading is filed, only with leave of court or the opposing party's consent.
22 Fed. R. Civ. P. 15(a)(1) and (2). The respondents oppose Robins' motion to amend; therefore, leave
23

24
25 ³ At 28 pages, the reply in support of the motion to amend exceeds the 20-page limit for such
26 documents set forth in Local Rule 7-4. Robins properly filed a motion for leave of court to file the 28-
page reply (ECF No. 284). The court finds that there is good cause for Robins to exceed the 20-page
limit with regard to the reply in support of the motion to amend, and will, accordingly, grant Robins'
motion for leave of court to do so.

1 of court is required. “The court should freely give leave when justice so requires.” Fed. R. Civ. P.
2 15(a)(2).

3 In *Foman v. Davis*, 371 U.S. 178, 181-82 (1962), the Supreme Court interpreted the statutory
4 mandate that leave to amend should be freely-given when justice so requires as a limit on the district
5 court’s discretion. The Court stated, “the Federal Rules reject the approach that pleading is a game
6 of skill in which one misstep by counsel may be decisive to the outcome and ... accept[ed] the
7 principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Foman*, 371
8 U.S. at 182 (*quoting Conley v. Gibson*, 355 U.S. 41, 48 (1957) (internal quotation marks omitted)).
9 Permissible justifications for denial of a motion to amend include: (1) undue delay; (2) bad faith or
10 dilatory motive; (3) undue prejudice to the opposition; (4) repeated failures to correct deficiencies
11 with previous amendments; and (5) futility of the amendment. *Id.*; *see also Anthony v. Cambra*, 236
12 F.3d 568, 577 (9th Cir.2000); *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir.1995).

13 The fourth amended habeas petition would, most significantly, present four claims that are
14 wholly or partly new: Claims 6, 7, 11, and 25. Claim 6 is a completely new claim of ineffective
15 assistance of trial counsel. Fourth Amended Petition, pp. 17-54. Claim 7 is a claim of ineffective
16 assistance of trial counsel with a newly added theory, based on new evidence. *Id.* at 55-99. Claim
17 11 is a completely new claim based on the doctrines established in *Brady v. Maryland*, 373 U.S. 83
18 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959). *Id.* at 134-49. Claim 25 is a new cumulative
19 error claim. *Id.* at 164. Robins admits that Claims 6, 11, and 25 are unexhausted in state court (*see*
20 Fourth Amended Petition, pp. 17, 134 (regarding Claims 6 and 11); Motion for Stay (ECF No. 268),
21 p. 4 (regarding Claim 25)), and he concedes that Claim 7 is at least arguably unexhausted (*see Reply*
22 *in Support of Motion for Leave to File Fourth Amended Habeas Petition* (ECF No. 283), pp. 2, 27;
23 *see also* Fourth Amended Petition, p. 55 (stating Claim 7 “has not been exhausted in state court”).

24 In Claim 6 of his fourth amended petition, Robins claims that his trial counsel was ineffective
25 for failing to adequately investigate and present evidence regarding the cause of Brittany Smith’s
26 death, as well as the cause of apparent injuries she suffered prior to her death. Fourth Amended

1 Petition, p. 17. Robins claims that, when she died, Brittany “suffered from the devastating effects of
2 scurvy, Vitamin C depletion (Barlow’s Disease), and that this condition was the predominant
3 required causative factor in her death.” *Id.* According to Robins, scurvy provides an alternative
4 explanation – besides physical abuse – for a prior fracture of Brittany’s femur and for the
5 hemorrhaging in various parts of her body that were discovered after her death. *Id.* at 27-31. Robins
6 submits, in support of Claim 6, the declarations of Patrick D. Barnes, M.D, a radiologist. (Exhibit
7 262) and Dr. John Plunkett, M.D., a general and forensic pathologist (Exhibit 265). Dr. Barnes
8 states that Brittany’s x-rays “revealed multiple classic images typical of those seen in children with
9 scurvy (Barlow’s Disease).” Exhibit 262, p. 5, ¶15. Dr. Barnes states that “the radiographic images
10 of the fracture to Brittany Smith’s right leg (as well as images of her left leg, not associated with any
11 fracture) are highly suggestive of vitamin C deficiency/depletion with scurvy (Barlow’s Disease).”
12 *Id.* at p. 3, ¶9. Dr. Barnes also states that “[i]f left untreated, scurvy can lead to death.” *Id.* at p. 8,
13 ¶24. Dr. Plunkett states that it appears that “scurvy was both a significant and possibly the required
14 causative factor” in Brittany’s death. Exhibit 265, p. 6, ¶14. Dr. Barnes states that by 1988 the signs
15 of abnormal bone formation and deterioration associated with scurvy were “well documented in the
16 medical literature and had been for many decades.” Exhibit 262, pp. 5-6, ¶16.

17 The court finds Claim 6 to be a colorable claim of ineffective assistance of counsel, going to
18 the question of Robins’ guilt or innocence, as well as to the propriety of his death sentence. As such,
19 the court finds that the interests of justice weigh in favor of allowing Robins to amend to add this
20 claim.

21 Brittany Smith died 25 years ago. This habeas corpus action is over 14 years old. The court
22 has long been concerned about the age of this case. It is late for an amendment adding completely
23 new claims to Robins’ petition. However, Robins makes a detailed, colorable showing that any
24 delay in this regard can be attributed to unprofessional conduct and ineffective representation of him
25 by his former counsel, Patricia Erickson, and should not be attributed to Robins himself. *See* Motion
26 for Leave to Amend (ECF No. 262), pp. 4-30. The court does not here make any ruling, or suggest

any opinion, with respect to whether Erickson's performance is such as might excuse any procedural default, or any limitations bar, that might exist as a result of Robins' delay in discovering and proffering Claim 6, but the court does find that Robins' showing regarding Erickson's performance is sufficient to support a finding that there has been no undue delay, bad faith, or dilatory motive. Moreover, given the nature of this case, and the nature of the allegations in Claim 6, respondents will not be unduly prejudiced by the filing of the fourth amended petition. The court will grant the motion to amend.⁴

Motion for Stay

Robins' fourth amended habeas petition is a "mixed petition," meaning it contains both exhausted and unexhausted claims. In the motion for stay, Robins requests that the court stay this case while he exhausts the unexhausted claims in state court. *See* Motion for Stay, pp. 5-6.

A federal court may not grant habeas corpus relief on a claim not exhausted in state court. 28 U.S.C. § 2254(b). The exhaustion doctrine is based on the policy of federal-state comity, and is intended to allow state courts the initial opportunity to correct constitutional deprivations. *See Picard v. Conner*, 404 U.S. 270, 275 (1971). To exhaust a claim, a petitioner must fairly present the claim to the highest state court, and must give that court the opportunity to address and resolve it. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (*per curiam*); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992).

In *Rhines v. Weber*, 544 U.S. 269 (2005), the United States Supreme Court circumscribed the discretion of federal district courts to impose stays to facilitate habeas petitioners' exhaustion of claims in state court. The *Rhines* Court stated:

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his

⁴ Given the court's views regarding Claim 6, the court need not analyze the motion to amend, or for that matter the motion for stay, with regard to Claims 7, 11, and 25 of the fourth amended petition.

1 unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) (“An application
2 for a writ of habeas corpus may be denied on the merits, notwithstanding the failure
of the applicant to exhaust the remedies available in the courts of the State”).

3 * * *

4 [I]t likely would be an abuse of discretion for a district court to deny a stay and to
5 dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his
unexhausted claims are potentially meritorious, and there is no indication that the
6 petitioner engaged in intentionally dilatory litigation tactics. In such circumstances,
the district court should stay, rather than dismiss, the mixed petition.

7 *Rhines*, 544 U.S. at 277-78.

8 *Rhines* does not state, or suggest, that every unexhausted claim in the petition must satisfy,
9 individually, the “good cause” and “potentially meritorious” requirements before a stay is permitted.
10 If a stay is warranted with respect to any single claim, the court need not conduct a claim-by-claim
11 analysis regarding the remaining claims.

12 In his motion for stay, incorporating argument from his motion to amend, Robins asserts that
13 his previous counsel, Patricia Erickson, acted in an unprofessional manner, and was ineffective, and
14 that “he has good cause for his failure to exhaust his new claims based on [her] ineffectiveness and
15 egregious professional misconduct” Motion for Stay, pp. 5-6 (referencing Motion to Amend,
16 pp. 4-29, 73-74, and 95-97). Robins continues: “At the same time Petitioner also shows that any
17 delay in the bringing of the new claims was caused by Ms. Erickson’s unprofessional conduct;
18 actions not endorsed by the Petitioner.” *Id.* at 6. He concludes: “The showing that his failure to
19 exhaust is the fault of his state postconviction counsel satisfies the *Rhines* good cause requirement.”
20 *Id.*

21 In *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), the Supreme Court held that “[w]here, under
22 state law, claims of ineffective assistance of trial counsel must be raised in an initial-review
23 collateral proceeding, a procedural default will not bar a federal habeas court from hearing a
24 substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there
25 was no counsel or counsel in that proceeding was ineffective.” *Martinez*, 132 S.Ct. at 1320. While
26 the *Martinez* decision did not deal directly with the issue of good cause for a failure to exhaust, its

1 holding, with respect to the issue of good cause for a procedural default, concerns a similar issue,
2 and is analogous and instructive.

3 The *Rhines* opinion does not describe in detail what constitutes good cause for failure to
4 exhaust, and the Ninth Circuit has provided no clear guidance on that question, beyond holding that
5 the test is less stringent than an “extraordinary circumstances” standard. *See Jackson v. Roe*, 425
6 F.3d 654, 661-62 (9th Cir. 2005) (citing *NLRB v. Zeno Table Co.*, 610 F.2d 567, 569 (9th Cir.
7 1979)). Many district courts have concluded that the standard is more generous than the good-cause
8 showing needed to excuse a procedural default. *See, e.g., Rhines v. Weber*, 408 F.Supp.2d 844, 849
9 (D.S.D. 2005) (applying the Supreme Court’s mandate on remand). This view is supported by the
10 Supreme Court’s opinion in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), where the Court
11 acknowledged that a petitioner’s “reasonable confusion” about the timeliness of his federal petition
12 would generally constitute good cause for his failure to exhaust state remedies before filing his
13 federal petition. *Pace*, 544 U.S. at 416-17. In light of this precedent, and especially in light of
14 *Martinez*, the court concludes that ineffective assistance of counsel in initial-review collateral
15 proceedings, in failing to raise a substantial claim of ineffective assistance of counsel at trial, may
16 establish cause for the failure to exhaust that claim.

17 In Nevada, a claim of ineffective assistance of trial counsel generally must be made, in the
18 first instance, in a first state habeas action. *See Corbin v. State*, 111 Nev. 378, 381, 892 P.2d 580,
19 582 (1995) (“[T]his court has consistently concluded that it will not entertain claims of ineffective
20 assistance of counsel on direct appeal.”). The court agrees with Robins that, in light of *Martinez*,
21 and the other caselaw cited above, he has shown good cause under *Rhines* for his failure to exhaust
22 the substantial ineffective assistance of trial counsel claim set forth in Claim 6 of his fourth amended
23 petition. The court finds, further, that Claim 6 is at least potentially meritorious. And, there is no
24 indication that Robins has ever engaged in intentionally dilatory litigation tactics. Therefore, the
25 requirements for a stay of this action pending exhaustion of Robins’ claims in state court, as set forth
26 in *Rhines*, are satisfied.

1 The court will grant Robins' motion for stay, and stay this action. In exercising its discretion
2 to grant the stay, the court takes into account the effect of *Crump v. Warden*, 113 Nev. 292, 934 P.2d
3 247 (1997), under which, it appears, there is at least a possibility that the Nevada courts may
4 consider, on their merits, Robins' unexhausted claims, including the unexhausted claim set forth in
5 Claim 6. Moreover, the court takes into account the nature of Claim 6: a colorable claim that
6 Robins is actually innocent and that his death penalty was improperly imposed.

7 The court's intention is that this will be the last time that the court imposes a stay to facilitate
8 Robins' exhaustion of claims in state court. Robins must exhaust *all* of his unexhausted claims in
9 state court during the stay imposed pursuant to this order.

10 **IT IS THEREFORE ORDERED** that petitioner's Motion to File Pleading in Excess of
11 Twenty Pages (ECF No. 284) is **GRANTED**. Petitioner is granted leave of court to file his 28-page
12 reply in support of his motion to amend. As that document has already been electronically filed, the
13 Clerk need take no further action in this regard.

14 **IT IS FURTHER ORDERED** that petitioner's Motion for Leave to File Fourth Amended
15 Petition for a Writ of Habeas Corpus (ECF No. 262) is **GRANTED**. Petitioner is granted leave of
16 court to file his fourth amended habeas petition. The Clerk of the Court shall separately file
17 petitioner's fourth amended habeas petition, a copy of which is attached as Exhibit A to petitioner's
18 motion to amend (ECF No. 262).

19 **IT IS FURTHER ORDERED** that petitioner's Motion for Stay and Abeyance (ECF No.
20 268) is **GRANTED**. This action is **STAYED** to allow petitioner to exhaust, in state court, all his
21 unexhausted claims for habeas corpus relief.


22 **IT IS FURTHER ORDERED** that, on or before **December 15, 2013**, petitioner shall file
23 and serve a status report, describing the status of his state-court proceedings. Thereafter, during
24 the stay of this action, petitioner shall file such a status report every 6 months (on or before
25 June 15, 2014; December 15, 2014; etc.). Respondents may, if necessary, file and serve a response
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1 to any such status report within 15 days after its service. If necessary, petitioner may reply within 15
2 days of service of the response.

3 **IT IS FURTHER ORDERED** that, following the conclusion of petitioner's state court
4 proceedings, petitioner shall, within **30 days**, make a motion to lift the stay.

5 **IT IS FURTHER ORDERED** that this action shall be subject to dismissal upon a motion by
6 respondents if petitioner does not comply with the time limits in this order, or if he otherwise fails to
7 proceed with diligence during the stay imposed pursuant to this order.

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9 Dated this 4th day of November, 2013.

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14 LARRY R. HICKS
15 UNITED STATES DISTRICT JUDGE
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